No. 105.

Reply Brief of Atty. Gen. & Binney & Co. for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
THE COMMISSIONERS OF THE SINKING FUND of the City of Louisville and the City of Louisville, Kentucky. } No. 105.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF IN REPLY.

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THE FACTS IN THE CASE.

The appellant's original brief contains what is believed to be a plain, impartial statement of the facts in this case as they appear in the record. Counsel for the appellees has seen fit, however, to present his own statement of the case, differing in some important particulars from that made in the appellant's brief, and therefore calling for some attention.

At the foot of page 1 of the appellees' brief there is a reference to the "undistributed surplus which was converted into stock or scrip dividends." As the findings of the court below do not state that any undistributed surplus was converted into stock or scrip dividends, the statement quoted would be unwarranted even if it were a statement of fact. It is submitted, however, that it is clearly a conclusion of law, and for that reason also wholly out of place in a statement of facts. Furthermore, as the language of counsel above quoted immediately precedes the words "were held by the officers of the Government to be subject to taxation," it necessarily suggests the inference that the officers of the Government held that the undistributed surplus was converted into stock or scrip dividends and was taxable in that form—an inference wholly at variance with the facts of the case, as it appears the surplus was taxed before the stock dividends were declared. As the same statement as to undistributed surplus precedes by but little space the statement that "before paying over the dividends or interest the taxes were taken out and the city received the dividends or interest diminished by the amount of taxes so paid, and its revenues were lessened to that extent" (appellees' brief, p. 2), the inference is suggested that the city received its stock dividends diminished by the amount of the taxes paid upon them—an inference unwarranted by the facts as found by the court. Similar references to taxes paid on "stock dividends" and on "undistributed surplus or stock dividends," meaning, apparently, that these two expressions are equivalent, are found all through the

appellees' statement of the case, and are in every case unwarranted by the statement of facts made by the court below; but it is unnecessary to point out every instance.

On page 6 of the brief appellees' counsel states:

> The claim of $3,008 for refund on account of taxes paid on stock dividends was not included or considered in the adjustment made under the act of 1890, but arose out of a stock dividend declared subsequently to the one which had been at that time considered and allowed.

On page 17 appears this further statement:

> The item of $3,008.40 arose out of a 100 per cent stock dividend made in 1880. It has nothing whatever to do with the $17,000 allowance made in 1891. That was based solely on the stock dividend of 40 per cent which was declared in 1867 and 1868. It is doubtful whether the $3,008.40 item was ever presented in 1890, and whether it was or not, it was not considered by Commissioner Mason at all.

If the words "included," "considered," and "presented" are used in their ordinary meanings, these statements are at variance with the facts found by the court below. The court states (Rec., 8, 11):

> He [the Commissioner, in 1891] refused to allow the claim on account of taxes paid on gross receipts and on interest and so much of the claim on account of taxes on undistributed surplus as concerned the taxes levied in 1868, 1869, 1870, and 1871. * * * The claim [of 1893] for the amounts stated to have been collected from the railroad company on account of taxes levied on its undistributed surplus in 1868 to 1871, amounting to $3,008.40 in all, had been included in the claim presented in 1890, but, as stated in the fifth finding, had not been allowed.

It is true that the claim of $3,008.40 on account of taxes on surplus had not been "included" in the allowance made under the act of 1890, but it certainly was both "included" and "considered" in the adjustment—i. e., the audit and settlement of the claim made in that year.

The appellees' counsel further states (brief, p. 9):

> It was not denied that taxes had been collected upon such dividends [the stock dividends] and that the city had been a loser to that extent; neither was it contended that the tax collected [refunded?] in 1891 had any relation to the claim for refunding taxes paid upon interest or bonds in 1893.

The above statements are made with reference to the Comptroller's action in 1893 in refusing to approve a certain part of the allowance made by the Commissioner and the Secretary. There is nothing in the record to warrant the assertion that the Comptroller did not deny that taxes had been collected upon stock dividends and that the city had been a loser to that extent; but on the contrary, as the record indicates that no taxes had ever been collected upon such dividends, the inevitable presumption is that the Comptroller did deny that there had been such a collection. While it is true that the claim which was paid in 1891 had no relation to that portion of the claim of 1893 which related to taxes paid upon interest on bonds, yet as the record states explicitly that the claim made in 1893 for taxes on surplus was one that had been rejected in 1891, it is to be presumed that whatever the Comptroller contended, it was in accordance with that state of facts.

APPELLEES' CONTENTION IN REGARD TO A REOPENING.

The court below based its decision in this case on the sole ground that the act of June 30, 1891, appropriated a specified sum of money to be paid to a designated party, so that no portion of the money so directed to be paid could either be withheld or be recovered back after payment, without further Congressional action. The appellees' counsel, however, scarcely attempts to sustain the position of the court below, but makes his chief argument on the theory that the Comptroller in 1893 undertook to reopen a settlement made by his predecessor. In this connection counsel draws a distinction between the action of the Comptroller and that of the Commissioner, who in 1893 reexamined the settlement of 1891,

> not for the purpose of readjudicating or reversing what had been done, but simply to ascertain whether the present claim was included in the former allowance. In making that examination he discovered some errors in calculation, which he corrected. This ended his work. (Appellees' brief, p. 15.)

Counsel's argument is that while it was perfectly proper for the Commissioner to reexamine the settlement of 1891 and correct errors of fact therein, it was not permissible for the Comptroller to correct that settlement on account of errors in law. In support of this argument the case of *United States* v. *Bank of the Metropolis* (15 Pet., 114) is cited. It is submitted that this argument is wholly irrelevant, and is based on an erroneous view of the facts of the case. If the court below was right in holding that the appropriation of 1891, to use the court's own language, "expresses no

intent to disturb what has been done," so that no portion of the payment made thereby could be set off in a future settlement, for errors either of fact or of law, without further authority of Congress, it was just as much beyond the power of the Commissioner to correct errors of fact as it was beyond that of the Comptroller to correct errors of law. The question is, therefore, not whether the Comptroller had power to reopen a settlement made in the time of his predecessor, but whether the payment of 1891 could afterwards be made the subject of set-off for any reason whatever. In comparing the action of the Commissioner and the Comptroller in 1893, appellees' counsel refers (brief, pp. 16–17) to an alleged letter of the Commissioner. It is submitted that this letter is not in the record now before this court, and that it is not the subject of judicial notice, not being an executive act which has the force of law. Had appellees' counsel seen fit to request the court below to incorporate this letter in its findings, and that request had been acceded to, the letter could properly have been considered by this court, if relevant, but as it is, there is no warrant for considering it.

The contention of appellees' counsel (brief, pp. 17 and 18) that "there was no effort by the city of Louisville to reverse or modify the decision of 1891" is based on a failure to realize the meaning of the plain language of the finding as to the fact that the claim made in 1893 for taxes or surplus to the amount of $3,008.40 had been presented and rejected under the act of 1890. It has been sufficiently shown before that counsel's statements are at variance with the record, and it is only necessary

to add that the facts shown by the record constituted a reopening of the settlement of 1891 by the appellees themselves, whether such a reopening was permissible or whether, as necessarily follows from the view taken by the court below, it was not permissible. Of course, if the view of the court below is correct, the action of the appellees in 1893 in reopening the settlement of 1891 was a nullity, and the changes in that settlement made by the Commissioner were likewise nullities, and so of the Comptroller's action; but if the appellees had a legal right in 1893 to re-present a claim rejected in the settlement of 1891, and thereby secure a reopening of that settlement, then undoubtedly the Comptroller can not be charged with having himself reopened a settlement made by his predecessor, whether in point of fact he had, under the circumstances of the case, power to reopen it or not.

The authority of the Comptroller under the facts of this case is sufficiently considered in appellants' former brief (pp. 52 to 57), and certainly the Comptroller's authority, existing as it does by virtue of a statute, can not be affected by the fact that a previous Solicitor of Internal Revenue did not happen to agree with him. Moreover, the Solicitor's opinion, quoted by appellees' counsel (brief, p. 11), is not in the record, and is scarcely to be regarded as the subject of judicial notice. If, however, it could be judicially noticed, the court would also take notice of the fact (and would attach to that fact its proper significance) that the appellees' counsel was himself the Solicitor, whose opinion he now cites as conclusive against the Comptroller.

THE CONTENTION THAT THE CLAIM OF $17,633.43 CAN NOT BE A SET-OFF.

Appellees' counsel contends that, apart from anything else, the Comptroller had no right to refuse payment of that portion of the allowance of 1893 to which he objected, and the appellants can have no right to retain the money, because the tax imposed by the act of June 30, 1864, section 122, being an income tax, not apportioned among the States with regard to their population, was unconstitutional under the decision in *Pollock* v. *Farmers' Loan and Trust Company* (158 U. S., 601). Whether that decision applies to the tax imposed in 1864 or not, it can not affect the present case. That portion of the allowance of 1893 which the Comptroller refused to approve related, it is submitted, to taxes paid by the Louisville and Nashville Railroad Company upon its own property, and not to taxes paid by the appellees upon any property of theirs, either directly or indirectly. If the tax was unconstitutional, the only person to whom it could possibly be refunded was the party that paid it, and the plea of its unconstitutionality can not be set up for the benefit of a party who did not pay it.

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for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 105.

THE UNITED STATES, *Appellant*,

v.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, AND THE CITY OF LOUISVILLE KENTUCKY.

Brief for the Appellees.

STATEMENT OF THE CASE.

During the period from October 1, 1862, to July 6, 1872, the City of Louisville, Kentucky, was the owner of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. There was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city. There also accrued a large amount of interest upon the bonds of the company. These cash dividends, the undistributed surplus which was converted into stock or scrip dividends, as well as the interest upon the bonds,

were held by the officers of the Government to be subject to taxation under the Internal Revenue laws of the United States, and taxes were assessed and collected at the rate of three per cent. upon some portions, five per cent. upon other portions, and two and one-half per cent. upon other portions, according to the terms of the statute in force at the time of the respective collections. The taxes so collected were paid by the railroad company and the amounts were deducted by the company from the sums due and payable to the City of Louisville; that is to say, before paying over dividends or interest, the taxes were taken out and the city received the dividends and interest diminished by the amount of the taxes so paid, and its revenues were lessened to that extent. These taxes were paid by the railroad company without the knowledge of the Fund Commissioners of the City of Louisville, and when they became aware of the fact, the time in which an application for a refunding of the taxes should be made had expired.

On the 16th of June, 1890, Congress passed an act for the relief of the Fund Commissioners of the City of Louisville, which is in the following words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Treasury and the Commissioner of Internal Revenue be, and are hereby, authorized and required to audit and adjust the claim of the Board of the Sinking Fund Commissioners of the City of Louisville, Ky., for Internal Revenue taxes on dividends on shares of stock owned by said board for said City of Louisville, in the Louisville and Nashville Railroad Company to the extent that such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim, and render judgment thereon in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law."

On the 25th day of September, 1890, the Sinking Fund Commissioners of the City of Louisville, made application for the refunding of taxes in the following amounts:

For tax on gross receipts	$18,240 59
For tax on cash dividends	24,801 14
For tax on undistributed surplus or stock dividends.	21,721 29
For interest	815 30

The foregoing claims were examined by the Secretary of the Treasury, and the Commissioner of Internal Revenue, and upon such examination they found that taxes had been deducted from cash dividends due and payable to said Board of Sinking Fund Commissioners to the amount of $24,801.14, and that taxes had been deducted from the undistributed surplus or stock dividends belonging to the City of Louisville, and due and payable to said Fund Commissioners to the amount of $17,712.80. They allowed said sum of $24,801.14 on account of taxes paid on cash dividends, and said sum of $17,712.80 on account of taxes paid on stock dividends. But they refused to allow the claim for taxes paid on gross receipts, and the claim for interest.

The two claims allowed amounted to the sum of $42,514.03. On the 14th day of February, 1891, the claims so allowed were submitted to Congress, as will appear by the following correspondence:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETAY,
"*Washington, D. C., February* 14, 1891.

"SIR: Referring to an act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky., approved June 16, 1890 (26 Stat., p. 157), which directed the audit and adjustment of the claim of said board of commissioners for internal revenue taxes, etc., I have

the honor to inclose copy of a report made by the First Comptroller in the case, of this date, showing that the sum of $42,514.03 is found due the claimants.

"As there is no appropriation available for the payment of the claim, the sum found due as shown by the Comptroller's letter is respectfully submitted for the action of Congress. Respectfully yours,

"A. B. NETTLETON,
"*Acting Secretary.*

"The SPEAKER OF THE HOUSE OF REPRESENTATIVES."

"TREASURY DEPARTMENT,
"FIRST COMPTROLLER'S OFFICE,
"*Washington, February 14, 1891.*

"SIR: The letter of Senator Blackburn, in regard to the claim of the sinking fund commissioners of the City of Louisville, Ky., is respectfully returned with the remark that the act for the relief of the claimant was passed by the Fifty-first Congress at the first session, on the 16th of June, 1890. It directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claim, which they have done, finding the amount of $42,514.03 due the claimant, the correctness of which finding is not questioned by this office. In due course, on the 4th instant, this claim, so adjusted, reached this office for payment. The act requiring the audit and adjustment does not carry an appropriation for the payment of the amount to the claimant, nor can it be paid out of the permanent annual appropriation, under section 3689, Revised Statutes.

"As the present Congress has had this matter under consideration, and referred it for adjustment, I see no impropriety in reporting it at once for an appropriation.

"Very respectfully,

"A. C. MATTHEWS,
Comptroller.

"Hon. A. B. NETTLETON,
"Acting Secretary of the Treasury."

The foregoing communications from the Secretary and Comptroller of the Treasury were referred to the Committee on Appropriations of the House of Representatives,

and considered by that committee, and afterwards the money was duly appropriated (26 U. S., p. 867). The following is the portion of the appropriation act that relates to this subject:

"PAYMENT TO CITY OF LOUISVILLE, KENTUCKY.

"For payment to the City of Louisville, Kentucky, the amount found due under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260 of the present session, $42,514.03."

In pursurance of said act the money was paid to the city by the proper officers of the Treasury Department.

The act of 1890 did not provide for the refund of taxes paid on interest on bonds, and on the 25th day of February, 1893, Congress passed the following additional special act:

"An act for the benefit of the State of Kentucky, Logan and Simpson Counties and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson Counties in said State, of the City of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties, and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners, respectively, and to said State, counties, and city, to the extent that such taxes

were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitation to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved, February 25, 1893."

Under this act the Fund Commissioners of Louisville made application for the refunding of the sum of $31,659.80 on account of taxes paid upon interest on bonds, and for the sum of $3,008.00 on account of taxes paid on stock dividends, making a total of $34,667.80. The claim of $3,008.00 for refund on account of taxes paid on stock dividends was not included or considered in the adjustment made under the act of 1890, but arose out of a stock dividend declared subsequently to the one which had been at that time considered and allowed.

The Commissioner of Internal Revenue proceeded to audit and adjust the aforesaid claim of $34,667.80, and upon such examination he found that taxes to the amount of $31,659.40 had been assessed, collected and deducted from and on account of interest on bonds belonging to the City of Louisville. Finding that there had been an error in computation in the amount allowed under the act of 1890, he corrected these errors, and having made such correction the Commissioner found that there was still due and unpaid to the City of Louisville, on account of taxes paid on interest upon bonds, the sum of $31,359.02

and that said sum had never theretofore been refunded; and a letter was addressed by the Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, to the Secretary of the Treasury recommending the allowance of said sum, and asking the approval of the Secretary. The finding and recommendation of the Commissioner were approved by the Secretary of the Treasury on the 6th day of October, 1893, and on the 7th day of October, 1893, the aforesaid sum of $31,359.02 was formally scheduled and allowed by the Acting Commissioner of Internal Revenue, and the proper notices given to the officers of the Treasury Department (a copy of the letters of the Commissioner and Secretary and schedule are made exhibits to the petition in the case). The papers and schedule then went to the Fifth Auditor, and were passed by him. From thence they were certified to Hon. Robert Bowler, Comptroller of the Treasury, and he refused to issue or direct the issuance of a warrant or draft for the amount. He admitted the correctness of the amount found due by the Commissioner of Internal Revenue, to wit: the sum of $31,359.02, on account of taxes paid upon interest on bonds; but he claimed that the amount allowed by the Commissioner of Internal Revenue and Secretary of the Treasury in 1890, and which was paid under the appropriation act of 1891, on account of tax on undistributed surplus or stock dividends, was illegally refunded; and that it was his right and duty to deduct said sum so allowed and paid from the present sum of $31,359.02. He, therefore, deducted the sum of $17,633.43 from the aforesaid sum of $31,359.02, and directed the issuance of a draft for the balance, to wit: $13,725.59, and refused to direct or consent to the payment of any other or further sum. This action of the Comptroller was not taken on the ground of any error in computation or of newly-discovered evidence, but solely upon the

alleged ground that the action of the Commissioner and Secretary of the Treasury, under the act of 1890, in refunding taxes paid on account of undistributed surplus or stock dividends, was erroneous and unauthorized.

This suit is, therefore, brought to recover the sum of $17,633.43, being the balance of the $31,359.02 allowed by the Commissioner and Secretary, and which the Comptroller of the Treasury refused to pay.

The Court of Claims rendered judgment in favor of the Fund Commissioners of the City of Louisville, for the sum of $17,634.43 from which the United States takes an appeal.

II.

ARGUMENT.

The Action of the Comptroller of the Treasury in overruling and setting aside the findings and decision of the officers of the Treasury Department made in 1890 and 1891, and deducting the sum of $17,633.43, which had been allowed and paid by them, from the sum of $31,359.02, allowed in 1893 on account of interest on bonds, was illegal and unauthorized.

It was and is conceded that $31,359.02 had been collected by the Government as taxes upon interest on bonds belonging to the City of Louisville and that the collection of this tax was illegal. The tax was collected without warrant of law, and no part of it had ever been refunded.

By the act of February 25th, 1893, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury was required to audit and adjust, among other things, the claim of the City of Louisville for in-

ternal revenue taxes collected on interest on railroad bonds owned by said city. The Commissioner found that taxes to the amount of $31,359.02 had been so collected and had never been refunded. This is an admitted fact.

The Comptroller, while not questioning the correctness or propriety of the allowance, refused to pay it, for the reason that two years before that time the officers of the Treasury Department had allowed and paid a certain sum of money which in Mr. Bowler's judgment ought not to have been done. There had been refunded to the city of Louisville the sum of $17,633.43 on account of taxes collected upon undistributed surplus which had been converted into stock dividends. It was not denied that taxes had been collected upon such dividends and that the city had been a loser to that extent. Neither was it contended that the tax collected in 1891 had any relation to the claim for refunding taxes paid upon interest on bonds in 1893. The two claims were different and distinct. But in the opinion of the Comptroller, the officers of the Treasury Department had committed error, and it was his duty to correct it. Having come to the conclusion that the former Commissioner and Secretary misunderstood the law he took the responsibility of reversing their action and deducting the amount allowed by them from the $31,359.02.

In relation to this claim of $17,633.43 action had been taken as follows:

January 24th, 1891, it was considered and its payment recommended by John W. Mason, Commissioner of Internal Revenue.

January 27th its payment was approved by William Windom, Secretary of the Treasury.

January 28th it was formally scheduled and allowed by John W. Mason, Commissioner of Internal Revenue.

February 3d it was reviewed and passed by the fifth Auditor.

February 14th the Secretary and Comptroller recommended to Congress that an appropriation be made to pay the claim.

March 3d, 1891, the money for its payment was appropriated by Congress.

March 7th, 1891, the sum of $17,633.43 (being part of the $42,514.03) was paid by order of A. C. Matthews, Comptroller of the Treasurer.

All these things were done more than two years before Mr. Bowler came into office.

By what right or authority can he reach back over this period of time and set aside all that was done by his predecessors?

In order to do it, he had to reverse the action of Mason, the Commissioner, Windom, the Secretary, and Matthews, the Comptroller. In addition to this he had also to repeal or nullify an act of Congress appropriating the money for the payment of the claim.

It is not often in the history of the country that we find such an extraordinary union of executive, judicial and legislative authority in a single person.

1. We contend, first, that the action of the former Commissioner, Secretary of the Treasury, Comptroller, and Congress, whether right or wrong, could not be reviewed by Mr. Bowler. The claim of $17,633.43, allowed and paid in 1891, was settled and must stay settled and adjusted forever.

No doctrine is better established than that the head of a department or bureau can not set aside, reverse or modify the decision of his predecessor in office, except for error in computation, newly-discovered and material evidence, or fraud. It will not be contended that any

of these things exist in this case. There were clerical errors or errors in computation which were corrected by the Commissioner of Internal Revenue as soon as discovered. There was no other error. That allowance of $17,633.43 was not the result of mistake but was made after careful consideration by the Commissioner and the Secretary of the Treasury. The then Solicitor of the Internal Revenue, to whom the subject was referred, gave an opinion, which is on file among the papers in this case, in which he expressly asserts that the tax collected on stock dividends should be refunded the same as the tax upon cash dividends. The following is an extract from his opinion:

"In one case it is cash, in the other stock. The burden of tax is the same in both instances. In each case the amount of payment to the city is diminished 5 per cent. on account of the tax. If it was unjust to collect the tax on the cash dividend because it was owned and held by a municipal corporation, it was equally unjust to collect a tax on a stock dividend for the same reason. And if the city is entitled to recover back the tax taken in one case, it is equally entitled to recover it back in the other. It is a sum of money obtained by the government without warrant or law. It is improperly in the Treasury, and the government having obtained possession of money which does not belong to it, it should pay it back to the rightful owner."

The foregoing quotation is made to show that the allowance on stock dividends was not a matter of accident or mistake, but was the deliberate judgment of the Commissioner and Secretary.

There is no pretense of any newly-discovered evidence. The facts were the same then as now and as well understood.

As to fraud—it will hardly be contended that Commissioner Mason, Secretary Windom, the Senate and

House of Representatives, Comptroller Matthews, and the Treasurer of the United States, entered into a conspiracy to rob the Treasury.

The only ground upon which the Comptroller of the Treasury claimed that the tax allowed in 1891 on stock certificates should be taken out of the $31,359.02, is that the action of the officers of the Treasury Department and Congress was erroneous; that they were guilty of an error of judgment; and that it was his right and duty to correct their errors.

But, as before intimated, if he was right and they were all wrong upon the legal question, it was beyond his jurisdiction and he could not touch or reverse their action, because of the well-established and long-observed practice of the departments and the adjudications of the courts. There should be an end to all controversies. If Mr. Bowler might be permitted to reverse the official action of the former officers of the Treasury Department, then his successors may reverse him and so on to the end of time. Questions would never be settled. Nothing would ever be put at rest. Claims would be bandied back and forth, changing as often as the administrations changed or as often as the judgments of public officers differed. We are none of us so absolutely immaculate that we can arrogate to ourselves superiority over everybody else, and we should be diffident about attempting to exercise ministerial, judicial and legislative power at the same time.

The proposition we have stated is not only founded in reason, but it is supported by the long practice of the government, and by a long line of judicial authorities. It seems superfluous to enter into any detailed examination of authorities, but we take the liberty of referring to a few cases.

In United States *v.* Bank of Metropolis (15 Peters, 114), the court says:

"The right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims in which material testimony is afterward discovered and produced."

This doctrine has been followed ever since and expressed in a variety of forms and with great emphasis. The question has been before the Court of Claims in a number of instances. The last case is that of Armstrong and 158 others, decided in March, 1894. The opinion of the court contains a careful and able review of the authorities upon the subject. It adopts as sound law the decision in the Waddell case (25 Court of Claims, 323, 327), wherein it is declared that—

"The law has been too well settled to be in doubt at this time; that public officers can not open and re-examine cases decided by their predecessors, except for fraud, mistakes in matters of fact arising from errors in calculation, or newly-discovered material evidence."

The same idea is expressed in another form in the Jackson case (19 Court of Claims, 504), in which the following language is used:

"It is a settled rule of administrative law that the final decision of a matter before the head of an executive department is binding upon his successor if no material testimony be afterward discovered and produced."

The opinions of the Attorneys-General are uniformly in the same direction. Some of these opinions are referred to in the Armstrong case, and set forth most clearly and with great strength that the doctrine of *res adjudicata* applies to claims considered by the head of a department, and that a decision made, whether right or wrong, can not be overruled by his successor.

In the light of these authorities what possible ground

can be found to sustain the view of the Comptroller as to his right to reverse the former action of the Treasury Department. It was not a matter of mistake, fraud or error in calculation; but a simple matter of legal judgment and learning.

2. The act of 1893 did not authorize re-adjudication of claim of 1890.

It is contended by counsel for the appellant that the act of 1893 authorized the Comptroller to open up and re-examine the claims which were presented to and allowed by Commissioner Mason in 1891.

No such authority can be found in the act. Certainly it is not given in express terms. Nor can we discover anything from which it can be inferred. Is it possible that Congress intended to confer upon Commissioner Miller or the Comptroller the right to re-examine and allow or disallow claims that had been adjusted, allowed and *paid* two years before? If so, it was easy to say it in express terms. Some reliance seems to be placed by counsel upon that clause in the act which declares that "taxes are to be refunded to the extent that such taxes were deducted from any dividends or interest due and payable to such boards and *which have not been heretofore refunded.*

This is one of the excuses offered for a re-examination of the seventeen thousand dollar claim. The clause referred to can not change the question or alter the situation in any respect. The fact that the sum of $17,633.43 was adjudicated, allowed and paid by the Treasury Department in 1891 still remains; the fact that it is now a mere difference of opinion still remains; and the fact that the Comptroller was attempting to reverse the action of his predecessors also remains. That clause of the act was never intended to confer power to revise or reverse former judgments, and the language used will not admit of

such construction. The questions submitted by the special act to the Commissioner and the Secretary were, first, were taxes deducted from dividends or interest; and, second, have these taxes so deducted ever been refunded? The officers found that $31,359.02 had been deducted from *interest on bonds*, and that said taxes had never been refunded. The correctness of this finding is not disputed. There is no pretense that a dollar of taxes paid on account of interest on bonds had ever been refunded. The special act of Congress under which former allowances were made did not cover taxes paid on account of interest at all.

3. Commissioner Miller did not attempt to reverse the action of his predecessor.

If it is contended by counsel for the appellant that Commissioner Miller did as a matter of fact review the proceedings of Commissioner Mason, and that this fact in some manner justifies the Comptroller in what he did, our answer is, that no such argument can be fairly drawn from the transaction. The act of 1893, as already stated, directed the Commissioner to ascertain whether any taxes on bonds or stocks had been illegally collected. This was his first duty. If he found that no taxes had been illegally collected, that ended the business; but if he found that such taxes had been collected, then his second step was to find out whether they had ever been refunded. One of the ways to ascertain this fact was to examine the cases where a refund had been made at a former period. This led him to examine the transaction of 1891. Not for the purpose of re-adjudicating or reversing what had been done, but simply to ascertain whether the present claim was included in the former allowance. In making that examination he discovered certain errors in calculation, which he corrected. This ended his work, and there was

no further duty for him to perform. The purpose of the clause in the act of 1893, which requires the Commissioner to find out whether certain taxes had been refunded, was to prevent double payment.

Again, it is proper to observe, that the act of 1893 did not confer any power whatever upon the Comptroller. He is not named in the act and he was not the person to whom these matters were submitted. Even if we admit that the commissioner had the right under the act of 1893 to review and reverse the judgment of his predecessor, that would confer no authority upon the Comptroller to do so. The facts show that Commissioner Miller made no attempt to reverse or modify Mason's decision. He simply corrected errors in computation. There was no attempt to set aside the refund of taxes which had been made on account of stock dividends, nor to reverse or modify it in any form.

It is a part of the history of the case that the Comptroller requested Commissioner Miller to review his action and take out the $17,633 which had been allowed in stock dividends and that he refused to do it. In his letter declining the request the Commissioner says:

"The question raised by the Comptroller has received very careful consideration, and I feel satisfied, first, that the deduction of the amount heretofore refunded to the City of Louisville on account of 'stock dividends' from the sum now found due as tax improperly collected on interest on bonds, ought not to be made.

"For such action, whether the former allowance was proper or not, would be equivalent to reopening that claim and reversing the action of my predecessor. This would plainly be contrary to the law as construed by the courts and Attorneys-General.

"I feel satisfied, in the second place, that Congress intended in the act of February 25, 1893, to authorize the refunding of the tax on 'stock dividends.'

"The previous allowance to the City of Louisville, under the provisions of the special act of June 16, 1890, which allowance embraced a sum computed as tax on a stock dividend, was ratified by Congress in the act of March 3, 1891, making an appropriation for payment of such allowance."

4. There was no effort by City of Louisville to reverse or modify decision of 1891.

It is urged as a reason why the Comptroller was warranted in reviewing and reversing the act of Commissioner Mason, that the City of Louisville in its claim made under the act of 1893, presented a claim that had been rejected under the act of 1890. This refers to the item of $3,008.40.

The counsel, on page 27 of their brief, say:

"Had the appellees not seen fit to make the claim for these items, then (supposing for the sake of argument that no part of the payment of 1891 could be recovered back without a re-opening by authority of Congress) the settlement of 1891 could not have been re-opened; for the mere re-examination of the items of that settlement required by the act of 1893, in order to prevent an allowance of taxes already refunded, could not strictly be called a re-opening, and there was nothing in the act to authorize the Commissioner of Internal Revenue to reopen the settlement of his own motion without request from the appellees. The appellees, however, by presenting again these previously disallowed items, demanded a re-consideration of the previous decision and a setting aside of the old settlement which had excluded these items."

The point made by counsel vanishes into air the moment you consider the facts.

The item of $3,008.40 arose out of a 100 per cent. stock dividend made in 1880. It had nothing whatever to do with the $17,000 allowance made in 1891.

That was based solely on the stock dividend of 40 per cent. which was declared in 1867–68. It is doubtful whether the $3,008.40 item was even presented in 1890, and whether it was or not it was not considered by Commissioner Mason at all. His allowance was confined to the 1867 dividend. The court in its fourth finding of fact uses the following language:

"Evidence was presented of the 40 per cent. increase in the stock of the railroad company in 1867–68 mentioned in the second finding, but it does not appear that any evidence as to the 100 per cent. increase of stock in 1880 was presented at that time."

There was therefore no consideration of it, and its after consideration in 1893 was not intended in any degree to affect the allowances made in 1891.

The above quoted paragraph from the brief of counsel makes certain important admissions which deserve notice. They are, first, that Commissioner Miller could not, under the act of 1893, on his own motion, open up the proceedings of his predecessor. Second, that unless the claimant asked to have the same opened up and reconsidered the settlement of 1891 must stand and

Third, that the review of former proceedings, merely for the purpose of preventing the allowance of taxes already refunded, would not justify a reversal or setting aside of the finding of 1891.

In view of the facts, these admissions are fatal to the contention made by counsel for the appellant.

5. *Consideration of authorities cited by counsel for the government.*

The counsel for appellants have shown great diligence and ability in the collection and arrangement of authorities. One of these, the County of Logan *v.* the United

States (31 C. Clms R., 23) is referred to in several parts of their brief, and is relied upon to support their contention. As that is one of the causes now under argument, it can hardly be regarded as undisputed law. On the contrary, we utterly deny its authority, and submit that it is the duty of this court to reverse the judgment rendered in that case.

As to the other authorities referred to, we are not inclined to dispute the principles enunciated and the weight to be given them in a proper case. They do not, however, support the position taken by appellants' counsel. They do not change the decision in U. S. *v.* Bank of Metropolis, which declares that "if a credit has been given or an allowance made by the head of a department, and it is alleged to be illegal, the judicial tribunals must be resorted to to construe the law under which the allowance was made and settle the rights between the United States and the party to whom the credit is given."

All that can be claimed for the cases cited, is that they announce in substance that the government is not in all cases bound by the illegal or improper action of executive officers, and that in a suit properly instituted in the proper court, the action of such officers may be reviewed.

No such condition of affairs exists and no such case is here presented. The inference which counsel draws from the authorities seems to be that the Comptroller may review, reverse or modify the finding and decision of any executive officer of the government and even the action of Congress itself, whenever in his opinion there has been a mistake of law or fact, or whenever the action taken has been unwise or done in ignorance. Such a doctrine is not only unsupported by judicial decisions, but if carried out would overthrow long-established precedents and result in endless confusion and disaster. The government is most successful when each branch is kept

separate and each officer confines himself to the duties which belong to his position. It is undoubtedly true that certain Comptrollers of the Treasury have deemed themselves clothed with extraordinary functions and have seemed to think that they, by virtue of their office, were made superior to all other executive officers, and even to the courts and Congress. We deny that they ever rightfully possessed any such power.

The Comptroller is not a judicial officer. He is an executive, or accounting officer. It was no part of his duty to adjudicate or pass upon the validity of the Louisville or Logan County claim. The statute imposed that business upon another and different tribunal, and when the Comptroller arbitrarily refuses to pay an allowance found by the only persons authorized to make it, he is usurping powers which belong to others and is acting in disregard of the law and in violation of his duties as a public officer.

III.

The act of Congress appropriating the money to pay the allowance on stock dividends is a legislative sanction of what was done by the Commissioner and Secretary.

These officers had performed the duty assigned them by the statute of 1890. They found that taxes had been paid on cash dividends to the amount of $24,801.14, and on account of stock dividends to the amount of $17,712.80, making a total of $42,514.93. There was no money in the treasury out of which it could be paid. They therefore submitted the whole matter to Congress and Congress directed the payment of the entire sum. This was a formal approval of the action taken by the Commissioner and Secretary.

The authority referred to in the decision of the Court of Claims in its opinion in this case is directly in point.

In case of Jordan *v.* United States (19 Court of Claims, 108), which involved a similar question, the court, among other things, says:

"But whatever induced Congress to take the several cases of numerous persons named in the act and to grant them relief from the public treasury the specific sum of money therein mentioned, whether it was for reasons set out in the act itself or for other and different reasons, their action is final and conclusive and can not be reviewed by this court or by any executive officer. It would be an unwarranted assumption of power to review elsewhere the facts and reasons which Congress states for granting money in any of the numerous cases—special acts passed for the relief of individual persons—and to deprive such persons of the money appropriated for them merely because it is held here in the Treasury Department that the conclusions of the act are not warranted by the facts and reasons upon which they purport to be founded."

The Supreme Court of the United States (113 U. S., 418–442) affirmed the judgment of the Court of Claims and declared, among other things, that—

"No discretion is vested in the Secretary of the Treasury or in any court to determine whether the sum specified was or was not the amount of tax assessed contrary to the provisions of such regulations."

The act of appropriating the money to pay the allowance made to the City of Louisville, by Commissioner Mason and Secretary Windom, is as explicit as words can possibly make it. It reads—

"For payment to the City of Louisville Kentucky, the *amount found due*, under the act of Congress approved June sixteenth, eighteen hundred and ninety, and re-

ported to Congress in House Executive document numbered *two hundred and sixty* of the present session, forty two thousand five hundred and fourteen dollars and three cents."

Counsel for appellant seek to avoid the force and effect of this appropriation act by a variety of statements. They are compelled to admit that the amount found due by Commissioner Mason and Secretary Windom was $42,514.03 and also that that was the sum reported in executive document No. 260. But they claim that only $24,801.14 was "*really* found due"; that the statement that $42,514.03 was found due "was, legally speaking, false"; that Congress was "misled"; that Congress "acted ignorantly"; and in short, that the legislative branch of the government did not understand its business.

We submit that Congress is presumed to act intelligently, and that it is hardly becoming in us to contend that Congress is ignorant and incompetent. If every law might be impeached because some outside party questioned its wisdom or because such party knows more than the body enacting the law, it would be difficult to tell what statutes are in force and what ones are not. It is a safe rule to obey the law. In the present case, however, there is affirmative evidence that Congress understood perfectly the basis upon which the appropriation was made. The same Congress passed the act of 1890, and the whole subject had been carefully considered by Committees of the two Houses.

IV.

The claim of $17,633.43 can not be a set-off.

The allowance of the $31,359.02 on account of interest on bonds is conceded to be just and legal. Even if the Comptroller had the right to review the proceedings of

Commissioner Mason and offset any sum which had been improperly allowed against the thirty-one thousand three hundred and fifty-nine dollars, the claim so used as a set-off must be a *valid* claim against the City of Louisville and in favor of the United States,—one which could be enforced by an action at law. The seventeen thousand dollars was a claim for taxes on *incomes*. The income tax was unconstitutional and being so the government having refunded it, could not recover it back.

We therefore submit:

That the action of the Commissioner of Internal Revenue and the Secretary of the Treasury in 1891 in allowing the sum of $17,633.43 to the city of Louisville on account of stock dividends could not be impeached or set aside by the Comptroller of the Treasury in 1893;

That the act of Congress appropriating the money to pay the claim was a legislative recognition of its validity; and

That even if the Comptroller had the right to review the action of his predecessor and nullify the law of Congress making the appropriation, still the seventeen thousand dollar claim could not be set off against the $31,359 for the reason that it was not a valid claim against the City of Louisville in favor of the government.

The judgment of the Court of Claims should be affirmed.

V.

We respectfully present the following additional propositions:

First. The judgment and finding of the Commissioner and Secretary made under the act of 1890, constitute an award which can not be impeached or reversed by the Comptroller or the court except upon the ground of mistake or fraud. Their action is equivalent to the rendition

of a judgment in favor of the claimants against the government, or it is at least the statement of an account by the proper authorities and is binding upon the United States. Now, after this finding has been made and the decision rendered, the Comptroller can not set it aside.

It is as if the judge of a court had rendered judgment in favor of a plaintiff, and the sheriff or marshal holding the writ of execution should attempt to overrule the court and change the journal entry or the writ.

It is wholly beyond his jurisdiction. He is merely a part of the machinery by which, when the amount is ascertained, the money is to be paid. He has nothing to do with it, or any control over the question of liability. The Commissioner of Internal Revenue and the Secretary of the Treasury are the tribunal to which the law commits the determination of the case. The Comptroller has no right to overrule his superiors or override their decision. Neither has he any right to seek to defeat and neutralize their findings by going back and undoing, or attempting to undo, the work of a former administration.

If Congress had intended to constitute him a member of the tribunal, which was to decide the questions submitted in the special act, it would have added his name to the list; and if it had intended he should review the action of the Commissioner and Secretary it would have said so, in plain language.

United States *v.* Kaufman, 96 U. S. R., 567;
United States *v.* Savings Bank, 104 U. S. R., 728.

Second. Even if we assume that the Comptroller had the right to review the judgment of his predecessor, the finding and decision of Commissioner Mason and Secretary Windom in 1891 must stand, for the reason that they were warranted by the facts and the law.

Third. The history of the passage of the acts of 1890

and 1893 expressly shows that Congress intended to refund the taxes paid on undistributed surplus or stock dividends.

Fourth. The act under which the taxes in controversy were collected by the government was unconstitutional and the party injured is entitled to relief.

The last four propositions apply not only to the case we have been considering, but also to the case of the Fund Commissioners of Logan County *v.* The United States, and we beg leave to refer for a continuation of the argument to our brief in the last named case.

ALPHONSO HART,
Attorney for Appellees.

FONTAINE T. FOX,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 167.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY AND THE COUNTY OF LOGAN, KENTUCKY, *Appellants,*

v.

THE UNITED STATES.

Brief of Alphonso Hart in behalf of Appellants.

STATEMENT OF THE CASE.

The County of Logan, in the State of Kentucky, was, between the first day of October, 1862, and the sixth day of July, 1872, the owner of a large amount of the stock of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. There was also a large amount of undistributed surplus belonging to the county, upon which stock or scrip dividends were issued to the county. These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at

the time of the respective collections. The taxes were paid by the railroad company, and the amounts so paid were deducted by the company from the sums due and payable to the County of Logan—that is to say, before paying over dividends, the taxes were taken out, and the county received the dividends diminished by the amount of the taxes so paid, and its revenues were lessened to that extent. In the month of May, 1893, the Fund Commissioner of said County of Logan made application to the Commissioner of Internal Revenue under the act of Congress passed February 25, 1893, entitled, "An Act for the Benefit of the State of Kentucky, Logan and Simpson Counties and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee" (Chapter 165, U. S. Statutes of 1893), for the refunding of the sum of $17,606.14.

The act referred to reads as follows:

"An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties, and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners,

respectively, and to said State, counties, and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitation to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved, February 25, 1893."

Directed by the aforesaid act of Congress, the Commissioner of Internal Revenue proceeded to examine, audit and adjust said claim, and found that the sum of $9,533.54 of taxes had been deducted from the cash dividends and $5,864.21 of taxes had been deducted from the undistributed surplus or stock dividends, due and belonging to said county, and that there was due to said county on account of taxes so collected and paid, the sum of $15,397.75, and that no part of said taxes had ever been refunded. And Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, on the 28th day of September, 1893, addressed a letter to the Secretary of the Treasury recommending the allowance of said sum, and asking his approval. On the 6th day of October, 1893, Hon. C. S. Hamlin, Acting Secretary of the Treasury, approved this action and recommendation of the Commissioner, and on the seventh day of October, 1893, it was formally scheduled and allowed by the Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, of which notice was given to the proper officers of the Treas-

ury Department. The schedule so made out and the papers in the case were referred to the Fifth Auditor of the Treasury and passed and approved by him. They then went before the First Comptroller, and he refused to issue a warrant for the amount or direct the payment of the same, holding that the allowance of the claim for taxes paid on account of stock dividends was illegal and unauthorized. He, thereupon, directed the payment of $9,533.54 and refused to pay any other or further sum. This suit is brought to recover the sum of $5,864.21, which was rejected by the Comptroller and which he refused to pay.

The draft issued by the Treasury Department for the sum allowed by the Comptroller was accepted by the County of Logan in part payment only of its claims, it expressly reserving the right to sue for the balance.

The letters of the Commissioner and Secretary by which said claims were allowed and approved are annexed to the petition and set forth in the record.

Suit was brought in the Court of Claims to recover said sum of $5,864.21, and the petition was dismissed. This is an appeal from that decision.

None of the taxes which were asked to be refunded were paid by the county itself, but by the railroad company, without the knowledge of the officers of the county. The railroad acted as the agent of the county and paid the taxes by authority of section 122 of the act of June 30th, 1864, which provides that said companies "are authorized to deduct and withhold from all payments on account of any interest or coupon and dividends due and payable as aforesaid the duty of five per centum, and the payment of the amount of said duty so deducted from the interest, coupons or dividends * * * shall discharge said company from that amount of the dividend or interest or coupon * * * ."

Prior to the passage of the act of 1893, under which the Commissioner and Secretary acted, the City of Louisville, Kentucky, had been allowed a refunding of taxes, under an act of a similar character which was passed in 1890, the sum of $24,801.14, on account of cash dividends, and of $17,712.80 on account of stock dividends or undistributed surplus, making a total of $42,514.03, and Congress appropriated the money to pay the same. The act making the appropriation reads as follows:

"For payment to the city of Louisville, Kentucky, the amount *found due* under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260 of the present session, $42,514.03.

And the money was paid to the city by the proper officers of the Treasury Department.

The two amounts which were found due and which made up the above sum of $42,514.03 were found due in precisely the same manner as were the amounts found due in the Logan county case and under a statute having substantially the same phraseology.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in finding and holding that the award made by the Commissioner of Internal Revenue and the Secretary of the Treasury was not final and binding upon the Government.
2. In finding and holding that the judgment and decision of the Commissioner and Secretary could be overruled by the Comptroller or attacked in this action.
3. The judgment of the Court of Claims is not sustained or warranted by the facts as found by said court.
4. By the act of Congress approved February 25, 1893,

the said Commissioner and Secretary were authorized and required to audit and adjust the claim of petitioners for a refunding of taxes and ascertain the amount of the taxes so to be refunded, which were to be paid out of the permanent annual appropriation provided for similar claims, and their finding can not be questioned in this action, except upon the ground of mistake or fraud.

5. The Court of Claims erred in holding that the Commissioner and Secretary had no jurisdiction over the matter of refunding taxes on account of stock dividends.
6. The judgment and finding of the Commissioner and Secretary were in accordance with the facts and law.
7. Instead of a judgment dismissing the petition there should have been a judgment in favor of petitioners.

ARGUMENT.

I.

The finding made by the Commissioner of Internal Revenue and the Secretary of the Treasury was an award having all the force of a judgment and could not be questioned either by the Comptroller or the Courts, except for fraud or mistake.

On the 25th day of February, 1893, Congress passed an act authorizing and requiring the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to audit and adjust, among other things, the claim of the sinking fund commissioners of Logan County for the refunding of internal revenue taxes paid

on railroad dividends in stock and interest on bonds owned by said county to the extent that such taxes were deducted from any dividends or interest due and payable and which have not been heretofore refunded.

This constituted the Commissioner and Secretary a tribunal to decide the whole question, and in the absence of fraud, mistake or error in calculation, their adjudication was final. They were judges of the facts and law.

Acting under the authority of and discharging the duty imposed by the statute, the Commissioner and Secretary found there was due to the fund commissioners of Logan County, on account of taxes collected on cash dividends the sum of $9,533.54, and on account of undistributed surplus or stock dividends the sum of $5,864.21.

This is an award made by the special tribunal authorized by Congress. It has all the force and effect of a judgment.

The authorities are clear and convincing upon this subject.

In this connection we call attention to the following decisions.

The case of the United States *v.* Kaufman (96 U. S. R., 567) is directly in point.

In that case, Kaufman had paid fifty dollars more than the law required, and made application under the statute and regulations of the Treasury Department to have this sum refunded. The Commissioner of Internal Revenue granted the application and recommended the refunding of $47.50 and certified the fact to the Comptroller. The Comptroller refused to pay—upon what ground does not clearly appear. Kaufman brought suit in the Court of Claims to recover the amount. Judgment was rendered in his favor. The United States appealed to the Supreme Court and the Supreme Court affirmed the judgment of

the Court of Claims. Mr. Chief Justice Waite, in delivering the opinion of the court, says:

"It is now insisted that the finding of an allowance by the Commissioner is not enough, and that the court should have gone behind the allowance and found the facts in respect to the original claim. Such we think is not the law. To say the least, the allowance of a claim under this statute is equivalent to an account settled between private parties which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not a *prima facie* liability of the Government, but, when submitted and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached."

Further speaking of the matter, the learned Chief Justice says:

"The foundation of the suit is the refusal of the Government to pay a claim allowed by an officer authorized to pay moneys overpaid under certain circumstances, but who can only make payment through the proper disbursing agents of the Treasury. The officer has done all he can do. He has made the allowance and certified it to the Comptroller of the Treasury for payments."

See Bonton's case, 12 Court of Claims, 336.

The case of U. S. *v.* Savings Bank (104 U. S. R., 728), reaffirms the doctrine.

This was a case similar to the one above quoted.

Mr. Chief Justice Waite reviews and affirms the opinion in the Kaufman case, and says:

"We can not discover any material difference between the powers of the Commissioner under section 3426 and these which he has under section 3220. Under section 3426, he is to 'allow' the claim which is done either by

giving other stamps in lieu of these that have been spoiled, &c., or by repaying the amount or value. Under section 3220, he is to 'refund' and 'pay back.' His payment of money in both cases must be made through the accounting officers of the Treasury Department as he himself is not a disbursing officer. Whether his allowance is conclusive on the other officers, through whose hands it must necessarily pass before it can be paid by the Treasurer, we did not then and need not now decide. All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the Department to pass or pay the claim after it is once allowed by the Commissioner the allowance may be used as the basis of an action against the United States in the Court of Claims where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the Department declined to do what the law or Treasury regulations required of him before payment could be obtained. The fact of fraud, or mistake, must be established by competent evidence the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress."

In the foregoing cases the Commissioner acted under the powers conferred by a general statute giving authority to refund taxes improperly collected, or redeem stamps that have been lost or destroyed. If the act of the Commissioner under this general statute is final and can not be reviewed except for fraud or mistake, how much more is it so, when by a special act of Congress he is clothed with the authority and duty of investigating and rendering judgment. In the latter case he acts in direct and special obedience to a mandate issued by Congress.

Applying the decisions above quoted to the case now under consideration, there can be no doubt as to the finality of the adjudication by the Commissioner and Secretary, and we need go no further. Their award of $5,864.21 should stand, and it was the duty of the Court of Claims to render judgment in favor of the claimant for that amount. Refusing to do so, it committed error.

II.

The finding of the Commissioner was in accordance with the law and facts. Appellants were entitled to a refund of the taxes paid on account of stock dividends.

Assuming, however, for the time being, that the judgment of the Commissioner was not final and that the Comptroller and the court had a right to inquire into the matter as an original question, we assert that the decision rendered by the Commissioner was fully sustained by the facts and law of the case. Indeed, it was impossible to come to any other conclusion. The purpose of the statutes was to compensate for the losses which the city and county had sustained by reason of the payment of an illegal tax, and we submit that both upon principle and authority the City of Louisville was entitled to have the sum of $17,633.43 and the County of Logan was entitled to have $5,864.21 refunded. When a wrong is done, the correction should be as broad as the wrong itself.

The city and county owned a large amount of the stock of the Louisville & Nashville Railroad Company. Out of and upon this stock grew a large surplus fund. A part of this surplus was converted into cash dividends and another part was converted into stock dividends. This entire surplus was assessed with a tax. The whole

of the tax collected was illegal. Upon what principle of ethics or law do you refund a part and not the whole? It makes no difference whether the tax was taken out before the dividend was paid, or after. If one hundred dollars is due me and you take out ten under the name of tax and give me but ninety dollars, I am as much the loser as if the whole hundred had been paid into my hands, and then ten dollars had been taken from me. In the present case, the tax was paid by the railroad company and the dividends less the tax were paid to the city and county.

The method of proceeding is described by the Commissioner of Internal Revenue in a letter to the Secretary of the Treasury October 15, 1889 (Hardin County claim), as follows:

"The records of this office show that the Louisville and Nashville Railroad Company paid the full internal revenue tax on all dividends declared and paid during the period of taxation now in question, namely, from June 1, 1864, to December 31, 1871. It appears from returns made to this office by the railroad company, that the dividends were declared so as to include a given per cent. of capital (three per cent. for example) *and the taxes due thereon.* By this method the stockholders received the full three per cent. on their shares of stock and the United States received the full tax thereon. Those stockholders whose dividends were not taxable should have received the sum paid the United States as a tax on their dividend."

The statute speaks of money and scrip dividends, and requires that a tax shall be paid upon both. In Bailey *v.* Railroad, 22 Wall., 604, scrip and stock dividends as well as cash dividends are held subject to tax under the Internal Revenue laws. They are all assessed and collected under the same rule and treated precisely in the same way.

1. The decision of the court is founded on a misapprehension of the facts.

The ground upon which the decision of the Court of Claims is based in the Logan County case seems to be that the taxes assessed and collected had no connection with the surplus which went into the stock dividend, but was upon the gross profits of the road which were used for general expenses.

Mr. Justice Nott in the course of his opinion (page 13) uses the following language:

"The question then is, Was the Commissioner of Internal Revenue authorized to make this refund of a tax on moneys which were profits, but which were *never distributed* or *paid over to the shareholders as dividends?*"

On page 14 is the following:

"What right then had the claimant under the act of 1864 to a refund of the 5 per cent. tax paid on profits which were not distributed as dividends, but retained by the company for its own corporate purposes?"

Again, on page 15, the learned judge uses the following language:

"It (the surplus) remained in the hands of the company and was applied to the business purposes—to improving, increasing and augmenting the corporate property. It might have been distributed as dividends, *but was not.*"

We respectfully submit that the court labored under a misapprehension of the facts as shown by the records.

No tax paid upon the gross profits or income was ever refunded either by Commissioner Mason or Commissioner Miller, but on the contrary, the claim for a refund of taxes on gross profits was expressly rejected. The tax which *was* refunded and which is now in controversy was

the tax paid upon the surplus which entered into the stock dividend. This surplus fund was expressly distributed in *the form of a stock* dividend, and it was the same in both the Louisville and Logan County cases.

The letter of Acting Commissioner Wilson to the Secretary of the Treasury in its closing paragraph (p. 4) says:

"The tax claim was collected on the dividends and the surplus afterwards converted into dividends on stocks of the Louisville and Nashville Railroad Company held by Logan County, Kentucky, between October 1, 1862, and July 5, 1872. The total amount withheld from said county on account of tax on dividend on stock is found to be nine thousand five hundred and thirty-three dollars and fifty-four cents ($9,533.54) and the total share of taxes on surplus borne by said county is found to be five thousand eight hundred and sixty-four dollars and twenty-one cents ($5,864.21), making an aggregate of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents ($15,397.75).

"I propose to allow the claim for this amount."

The acting Secretary of the Treasury in his letter approving the Commissioner's recommendation (page 5), speaks of the claims as follows:

"You find that the sum of $15,397.75 was withheld by said Louisville and Nashville Railroad as follows: $9,533.54 on account of tax on dividends on stock of said railroad company held by Logan County, and $5,864.21 on account of tax on the surplus afterwards converted into dividends on stocks in said company held by said county.

"Your allowance is hereby approved, and the claim is herewith returned."

But we call special attention to the fifth finding of fact (page 9) made by the court in this case.

"Prior to the passage of the act 25th February, 1893, the following proceedings had taken place in the Treas-

ury Department relative to *the same taxes paid by the same company:*

"During the period from October 1, 1862, to July 6, 1872, the City of Louisville, Ky., was the owner of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. *There was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city.* These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections. The taxes were paid by the railroad company, and the amounts so paid were deducted by the company from the sums due and payable to the City of Louisville—that is to say before paying over dividends, the taxes were taken out, and the city received the dividends diminished by the amount of the taxes so paid, and its revenues were lessened to that extent."

[The italics are ours.]

It is therefore an undoubted fact that the $17,714.89 allowed by Commissioner Mason to the City of Louisville in 1891 and the $5,864.21 allowed by Commissioner Miller in 1893 were on account of taxes assessed upon the surplus belonging to the city and county respectively, which was set apart for and went into the stock dividend. The language of the court is explicit upon this point when it declares that "there was also a large amount of undistributed surplus belonging to the city upon which stock or scrip dividends were issued to the city. These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, *and taxes were assessed and collected* according to the terms of the statute in force at the time of the respective collections."

The stock dividend and the surplus out of which it was created are one and the same. This fund was directly set apart for the stockholders. If was not retained by the company, but was distributed as a dividend and the railroad company in paying the tax on the fund so set apart acted as the agent of the stockholders.

The court in its finding of facts declares that this surplus *belonged to the City of Louisville.* This being so, the share going to Logan County belonged to Logan County in the same way. The transaction by which the 40 per cent. dividend was declared applied to all the stockholders alike.

The court has incorporated into its findings of fact a copy of a return made by the railroad company, and it is given as an example of the manner in which the business was transacted. The returns were *all* in the same form, and these returns were required to be made whether they related to cash or stock dividends. The following is the example given:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent of dividend, being the whole amount paid to stockholders, etc.	5 per cent of dividend retained as excise tax.
$5,527,870 63	$1,718,068 01	4 per cent tax.	$232,752 44	$221,114 82	$11,637 62
Profits over dividend declared, $1,485,315.57, 5 per cent. of which is...					$74,265 78

If the foregoing table exhibits the true state of the case it proves the correctness of our position. The third column gives the rate of dividend *and* tax. The fourth column gives the amount of the dividend declared, which includes the tax. The fifth column shows that only 95

per cent. of the dividend so declared was paid to the stockholders; and the sixth column shows that 5 per cent. of this dividend was paid to the Government. The whole dividend is made up of the two parts. Logan County received only 95 per cent. of the dividend which belonged to it.

Now, turning to the act of 1893, we can see how perfectly it applies to this condition of things. The act declares that the taxes are to be refunded "to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded." The table shows that 5 per cent. was deducted; and, it having been illegally done and the money having been paid over to the Government, we now bring suit to recover it back. The whole dividend was ours, and we received only 95 per cent. of it.

2. *But, even if counsel are technically right in their contention as to the time when the tax was taken out, it would make no difference in the legal effect of the transaction.*

The tax on cash and stock dividends stand in the same relation to the law, and in both cases the corporation is simply the convenient Government tax-gatherer.

As to both kinds of dividends, the railroad is made responsible both as to "returns" and "collections." In both of them the tax was five per cent. on the "amount of all such dividends." In both of them the payment was definitely fixed for the exact day "whenever the same shall be payable." The practice was, as has been frequently set forth, for the railroad, whenever it proposed to declare a stock dividend, to set apart a certain amount out of their net earnings, which amount included the five per cent. tax. After deducting the tax from the amount set apart, the balance was distributed into a stock

dividend. The stockholder and not the railroad suffered the diminution. The damage was not remote and consequential, but direct and immediate. The whole philosophy of the eight sections, from 116 to 123, inclusive, under the head of "Income," is consistent only with this view.

We are not left in doubt on this question. The statute itself settles it in favor of the injured party and declares in almost so many words that the tax, whether taken out before or after the declaration of the dividend, is one and the same. The tax of $5,864.21 was collected under the provisions of the act of 1864, and particularly under sections 116 to 123, inclusive. (13 Stat., 284).

Section 122 provides that "any railroad company * * * that may have declared any dividend in scrip or money * * * as a part of the earnings, profits, income or gains of such company shall be subject to and pay a duty of five per centum on the amount of all such * * * dividends * * * whenever the same shall be payable." Duty to be "paid to the Commissioner of Internal Revenue within thirty days after the time when said * * * dividends become due and payable." In this case the above duty was due and payable within thirty days after stock dividend declared. The stock dividend by its express term covered the surplus that had accumulated. The law plainly required every stock dividend to pay the five per cent. tax. Who paid it and how was it paid?

Section 121 answers the question. It contains the following proviso:

"Provided that when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, company savings institution, insurance or *railroad* company, which has been assessed and the duty paid thereon, the amount of duty so paid on that

portion of the surplus or contingent fund may be deducted from the duty on such dividend."

Applying the above to the admitted facts we find: On the declaration of the Louisville and Nashville Railroad stock dividend of forty per cent. in 1867 a tax of five per cent. was apparently due the Government from every stockholder, including the County of Logan. From the surplus upon which this stock dividend was based the five per cent. had already been deducted (*i. e.*, the stock dividend in the words of the law "included a part of the surplus which had been assessed with the duty paid thereon"). Therefore when that dividend was made the amount of duty so paid on that portion of the surplus may be deducted from the duty on such dividend. As to these stockholders who were legally chargeable with such duty on the stock dividend this was the end of the matter, as the deduction and the tax were equal, but as to Logan County, which was not liable for said tax, the deduction thus allowed should have been paid to it and not retained by the Government, and the Government has to-day $5,864.21 of Logan County's money.

In other words, the Louisville and Nashville Railroad had a surplus, and it proposed to and did convert this surplus into a stock or scrip dividend. That dividend was subject to an assessment of five per cent. But no tax was assessed or collected for the reason that it had already been taken out of the surplus on which the dividend was declared. That is to say, a tax taken out before the dividend is declared is considered and held to be the exact equivalent of a tax upon the dividend itself after it is declared. They are in the eye of the law one and the same. The County of Logan, as a stockholder, was entitled to its share of the surplus funds of the company which were set apart for the dividend, either in money or

scrip without any illegal deductions or charges. If the tax was illegal, then the Government obtained money which belonged to Logan County, and the county has a right to demand that it be paid back. If, as the law declares, the payment of the tax before the declaration of the dividend is the same as and takes the place of payment after the declaration of the dividend, then the tax on the surplus is a tax on the dividend itself; so that whichever way you view it, the result is the same and the ground for relief the same.

3. The claim that the surplus had never been taxed not justified by the record.

Counsel for the Government in their attempt to answer the point raised upon the proviso contained in section 121, seem to claim that the surplus which was the basis of the stock dividend, never was assessed for taxation and never paid any tax, and that, therefore, the proviso has no application to the case in hand. They say on page 50 of their brief:

"Before there could be any deduction, however, the stock dividend must first have been returned for taxation, which the record does not show to have been done, either in 1867, when the stock dividend was declared, or in 1868, when the appellees received their new shares, or at any other time. This stock *dividend never was returned and never was taxed*, and the proviso in section 121 never operated upon it at all."

Thus the impression is sought to be made, that the surplus which entered into the stock dividend was never taxed, for if it was, it would be brought immediately under the terms of the proviso. Here it is well to refer to the record. That the surplus out of which the stock dividend was created, was assessed and the tax collected upon it, is shown by Commissioner Mason when in his letter

to the Secretary under date of January 4, 1891, he declares that the $17,712.89 "was collected as a tax on surplus profits, which were set apart as the basis of a stock dividend"; it is shown in the answer thereto by Secretary Windom in which he endorses and approves Commissioner Mason's statement; it is shown by the letter of acting Commissioner Wilson, to Secretary Carlisle of September 28, 1893, wherein he declares that "the tax claim was collected on the dividends and the *surplus afterwards converted into dividends* on stocks held by Logan County, and that the total amount withheld from said county on account of tax on dividends on stock is found to be $9,533.54 and *the total share of taxes on surplus, borne by said county, is found to be $5,864.21*"; it is shown by the answer of acting Secretary Hamlin when he speaks of said sum of $5,864.21 as "*the tax on the surplus afterwards converted into dividends*"; it is shown in the first finding of fact made by the court in the case of Louisville *v.* United States, where it declares that "under the internal revenue laws during that period, said company paid taxes to the United States upon its gross receipts, *its undistributed surplus*, the interest payable on its bonds and its cash dividends," and in its fifth finding of fact in case of Logan County *v.* United States, when it declares, "there was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city, and that this undistributed surplus which was converted into stock dividends, was held to be subject to taxation, and taxes were assessed and collected and taken out of the sums due and payable to the city."

All these proofs and many others that might be furnished, show that the surplus out of which the stock dividend of 1867 arose, was assessed and the tax collected, and every dollar which went into the stock dividends had borne its tax burden, and it was clearly intended by

the proviso of section 121, that having borne the tax once it should not be compelled to bear it again. The dividend, whether in money or stock, issued to Logan County, was, in the language of the court's finding, "lessened to that extent." That was the exact measure of the county's loss, and to the extent that the tax imposed and collected was illegal to that extent the county is entitled to recover.

Is it possible that all these public officers, and even the court itself, were mistaken? They were specially charged with the duty of ascertaining the facts, and they all agree that the portion of the surplus belonging to Louisville and Logan County, and out of which the stock dividend was created, *did* bear its five per cent. tax, and that the revenues of the city and county were diminished to that amount.

III.

The history of the passage of the acts of 1890 and 1893 shows that Congress intended to grant relief for taxes paid on account of stock dividends.

Two dividends were declared. The first was a cash dividend. As to the taxes paid or deducted from this, there is no controversy. They were paid by the railroad company and were taken out of the amount going to the county. The second dividend was the one declared in 1867, and which we call the stock dividend or undistributed surplus, for the reason that it consisted in the issue of forty per cent. increase of stock, based upon the surplus set apart for that purpose. Congress clearly had in mind this last transaction when it passed the acts of 1890 and 1893. There was no other stock dividend to which it could refer.

While the first bill in 1890 was pending, and before its passage, both the House and Senate were expressly informed of the exact nature of the transaction. The bill was introduced in the House and referred to the Committee on Claims. Mr. Burton made a report in favor of its passage. The following paragraph is contained in his report:

"The City of Louisville owned stock in the Louisville and Nashville Railroad upon which dividends were declared from time to time. Under the internal revenue laws a tax of 5 per cent. was for several years levied upon these dividends. This tax was not collected directly of the city, but of the railroad company, and *the dividends, less the tax, were paid by the company to the city.* This act of the railroad was without the knowledge or consent of the city."

In the Senate the bill was also referred to the Committee on Claims. Mr. Faulkner made the report of the committee. The report included a letter from the Acting Commissioner of Internal Revenue explaining the facts, and a letter from the United States Attorney for the District of Kentucky in regard to a judgment just rendered in that district. In the judgment of the court, the taxes in controversy were spoken of as "upon other stock issued to said county by said railroad company for dividends *which were paid by and in the stock so issued to said county.*"

In the body of Mr. Faulkner's report is the following:

"First. The evidence is clear that the railroad company, without notice to the sinking fund commissioners, *deducted from the amount of the dividends to which they were entitled the tax, which it paid over to the Government, and no notice of this was given to the city,* and no knowledge of the fact of this payment existed until some months after the bar of the statute attached."

Thus the attention of both houses of Congress was expressly called to the exact character of the claim made and the fact that the taxes sought to be refunded were taken from the fund upon which the dividends were based, or as Senator Faulkner expresses it, were "deducted from the amount of the dividends to which they were entitled.

The act of 1893 was passed under like conditions. It provided for the refuuding of taxes paid on interest and dividends in the case of the city of Louisville and the counties of Logan, Hart and Hardin, in Kentucky, and Sumner and Davidson, in Tennessee. In the cases of Sumner and Davidson the tax upon the cash dividend had already been paid and there remained nothing save the tax on stock dividends. This fact was called particularly to the attention of Congress. Mr. Cox reported the bill to the House. In the course of his report he says:

"The city of Louisville owned stock in the Louisville and Nashville Railroad upon which dividends were declared from time to time. Under the internal revenue laws a tax of five per cent. was for several years levied upon these dividends. The tax was not collected directly of the city but of the railroad company, and *the dividends less the tax* were paid by the company to the city."

In the Senate, Mr. Mitchell for Mr. Daniels, made the report. The following is an extract from it:

"The Counties of Sumner and Davidson made their appeal within the time required, but by some error or mistake of the department they were allowed only their tax on *money* dividends. *Their claim now is for the tax on stock dividends.*"

Congress was not left in the dark. It passed these bills

with a full understanding that the tax on stock dividends or on distributed surplus was to be refunded.

(See proceedings of Senate, February 1, 1893.)

The tax paid by the railroad company on account of the stock dividend was unconstitutional.

It has all along been conceded that as to counties and cities the tax was illegal, but by the decision recently rendered by the Supreme Court of the United States in case of Pollock *v.* Farmers' Loan and Trust Company, 158 U. S. R., 601, the collection of the tax was declared unconstitutional, whether paid out as the money of the railroad company or the County of Logan. It was a tax on incomes.

All the proceeds and profits arising from the operations of the road were held by the company in trust for the stockholders, subject only to the payment of operating expenses, interest and other necessary charges, and when the company held its meeting and finding that it had a large surplus on hand and decided to set that surplus apart to be converted into stock for the benefit of its stockholders, it was a practical severance of the fund from the bulk of the profits. If it paid tax upon this surplus then it paid an illegal tax, whether assessed upon the funds as the property of the road or the property of the stockholder. The stockholder is the injured party. He receives the dividend diminished by the amount of the tax. The Government has obtained a certain amount of money which rightfully belongs to him. Being the party in interest he may recover it back, and so it is with the County of Logan in the case under consideration.

We therefore respectfully submit—

First. That the findings and award made by the Commissioner of Internal Revenue and Secretary of the Treasury were final and not subject to review by the Comptroller or the courts except upon the ground of fraud or mistake, and neither of these exists.

Second. The judgment of the Commissioner and Secretary was in accordance with facts, law and equity.

Third. The history of the legislation shows that Congress intended a refunding of the tax on stock dividends.

Fourth. The tax sought to be recovered was unconstitutional, whether levied upon the railroad company or the county. The county has sustained the loss and is the real party in interest, and as such has the right to sue and recover it back.

We pray that the judgment of the Court of Claims may be reversed and proper relief granted.

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of Counsel.